IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 56
EMPC 97/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	URBAN DÉCOR LIMITED Plaintiff
AND	MINGXIA YU First Defendant
AND	YAN JIN Second Defendant

Hearing: On the papers

Appearances: D Zhang and E Tie, counsel for plaintiff
M Moncur, advocate for defendants

Judgment: 29 March 2022

JUDGMENT OF JUDGE KATHRYN BECK

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[1] Ms Yu and Ms Jin's employment with Urban Décor Ltd ended after a heated argument with Lei Han, the company's sole director and shareholder, during which they both stated that they quit and left the company premises. Mr Han subsequently issued both defendants with letters purporting to dismiss them from their employment.

[2] In its determination,[1] the Employment Relations Authority found that Ms Yu and Ms Jin were unjustifiably dismissed, placing significant weight on the failure of Urban Décor to provide a cooling off period before the sending of the dismissal letters.

1 *Yu v Urban Décor Ltd* [2021] NZERA 60 (Member Craig).

The awards made to them were then reduced by the Authority by 50 per cent due to what it saw as a serious element of contributory conduct on their part.

[3] Urban Décor challenges the finding of unjustified dismissal along with other findings about whether grievances were raised properly and/or in time, but it does not seek to disturb any of the factual findings made in the Authority.[2] It says that Ms Yu and Ms Jin resigned and are not due any remedies at all. Alternatively, if they were dismissed, it argues remedies should be reduced by more than 50 per cent.

Issues

[4] The issues for the Court were framed as questions of law (or, where appropriate, mixed questions of fact and law). While the plaintiff raised a number of issues, I have consolidated them as set out below.

[5] The issues to be determined by the Court are whether the Authority erred in law by finding that:

(a) Ms Yu raised her personal grievance within 90 days as required by the Employment Relations Act 2000 (the Act);

(b) Ms Yu and Ms Jin were dismissed by the plaintiff;

(c) such dismissal was unjustifiable;

(d) Ms Yu and Ms Jin were entitled to be reimbursed for lost wages under s 123(1)(b) of the Act;

(e) they were entitled to compensation under s 123(1)(c)(i); and

(f) any remedies should be reduced by 50 per cent under s 124.

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[2] What is often referred to as a non-de novo challenge as per s 179(4) of the Employment Relations Act 2000.

[6] If the Authority did err on any of the above, the question is then what is the decision of the Court?

[7] As noted, the challenge did not disturb any factual findings of the Authority. The defendants did not file a cross-challenge and so the matter proceeded on the basis of the undisputed parts of the determination, the pleadings and the issues as defined by the Court.

[8] The parties provided an agreed bundle of documents and an agreed chronology to assist the Court, along with written submissions. The matter has been dealt with on the papers.

[9] Chief Judge Inglis's decision in *Mikes Transport Warehouse Ltd v Vermuelen*, issued after submissions had been filed, presented new authority in relation to cooling off periods and accordingly an opportunity to provide further submissions was provided.[3] Its impact also raised questions of whether this was a situation in which the Court should exercise its powers under s 122 of the Act to find a grievance of another type, which I deal with further below.

Background

[10] It is helpful to set out some of the background to the dispute between these parties as found by the Authority.

[11] Mingxia Yu and Yan Jin were employed as curtain makers by Urban Décor Ltd trading as Promax Colours. They had worked for the company at its Auckland curtain factory since 2016. Mr Han is the company's sole director and shareholder.

[12] The defendants usually worked together as a pair on the factory floor. The Authority noted that Mr Han had a tendency to view them as a "work team" and to hold them jointly responsible for any errors one or the other might make.

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3 *Mikes Transport Warehouse Ltd v Vermuelen* [2021] NZEmpC 197.

[13] The relationship between the defendants and Mr Han appears to have been fractious. It was noted that both parties had detailed past disputes and performance concerns which the Authority, for the most part, found were not relevant to the issues to be determined. It did find that Ms Yu had received one previous verbal warning for spilling water in what was framed as a health and safety issue.

[14] The employment relationship between the defendants and Urban Décor ended on 10 December 2019 after an increasingly heated exchange between Ms Jin, Ms Yu and Mr Han which concluded with the employees saying that they quit and leaving the factory without clocking out. Mr Han then sent them dismissal letters early the next morning after receiving further messages from the defendants.

Did the Authority err in finding that Ms Yu raised her personal grievance within 90 days?

[15] Urban Décor claims that Ms Yu did not raise a personal grievance for unjustified dismissal within the 90 days required by s 114 of the Act. It makes several arguments in support of its claim. The material before the Court, however, does not support the arguments and it is clear that Ms Yu raised her grievance well within the 90 days for the reasons set out below.

The facts

[16] Statements of problem were promptly filed in the Authority by Ms Yu and Ms Jin on 13 December 2019. Copies were not provided to the Court.

[17] The company accepted that Ms Jin's statement of problem was served within 90 days and referred to her "termination". The plaintiff said this was to be contrasted with Ms Yu who, in her statement of problem, focused largely on earlier issues with her employer with little mention of the termination of her employment.

[18] At some point in December 2019 or January 2020, Mr Han provided statements in reply. Both were provided to the Court. The one in relation to Ms Yu is a comprehensive response and makes clear that a significant number of issues had been raised by the statement of problem.

[19] The initial basis for the plaintiff's claim that Ms Yu's grievance was not raised within 90 days was that there was no indication of any correspondence between the employees or their representative prior to statements of problem being lodged in the Authority. However, on the third day of the investigation meeting, Mr Young, the defendants' then-representative, produced an email dated 12 December 2019 which had been sent to the company.

[20] The letter has the subject line "personal grievance". In the investigation meeting Mr Han accepted he may have received it. It reads:

> personal grievance
>
> [Email addresses]
>
> Dear Lei Han,
>
> I am the advocate for Yan Jin and Mingxia Yu whom you dismissed on 10/12/2019,
>
> Now, I would like to raise their personal grievance with you and invite you to address the following issues ASAP.
> Could you please urgently email a copy of the employment Agreement (IEA) of both?
>
> [Section relevant to Ms Jin]
>
> For Ms Yu, please send me:
> A. Company's health and safety rule;
> B. the warning;
> C. which NZ law and Company's regulations Ms Yu did not follow?
> D. What error she has made.
>
> Please seek legal advice ASAP. If you wish, I can send you precedent cases to show that you have made big mistakes.
> If you wish we can also have a confidential meeting as the facts in your Notice of Termination are different from what I have been told.
> …

[21] The Authority found that the email satisfactorily raised an unjustified dismissal grievance within the time required. Urban Décor says it erred in doing so.

Did the email from Mr Young on 12 December 2019 validly raise a personal grievance?

[22] Urban Décor contends that there is a lack of particulars in the email which means it falls short of raising a valid personal grievance. In particular, it relies on

Chief Executive of the Manukau Institute of Technology v Zivaljevic in which this Court undertook an analysis of what was required under s 114 in order to raise a valid grievance.[4] The Court held that the employer must know what it is responding to, which means it must be given sufficient information to address the grievance, enable it to respond and resolve it informally, at least in the first instance.[5]

[23] Mr Zhang, counsel for Urban Décor, argues that the test is an objective one which involves a two-step process of a complaint under one of the s 103(1) categories (specifying the type of grievance) and the provision of sufficient particulars. He says the grievance raised by email on 12 December 2019 was insufficient because there was no reference to unjustified dismissal and so failed at the first step and then failed again because no particulars were provided.

[24] The linear approach submitted by the plaintiff is not reflective of the cases cited or the broader case law. The nub of counsel's submission appears to be that there was never any explicit mention of "unjustifiable dismissal" that would have put the employer on notice as to the type of grievance. Counsel relies on *Creedy v Police Commissioner* in support of his argument. However, *Creedy* makes it clear that there is no requirement for "any particular formula of words".[6] What is required is that the employer is made sufficiently clear on the type of the grievance and is able to respond as the legislative scheme mandates. *Zivaljevic* also makes it clear that it is possible for the totality of communication between an employer and an employee to constitute the raising of a grievance.[7]

[25] In addition to the email from Mr Young, there were WeChat communications from Ms Yu that contribute to the 'totality' of the grievance raised. After the incident on the factory floor, a message was sent by Ms Yu at around 5.30 pm on 10 December 2019. In it she expresses hurt and anger at his "harsh behaviour"; alleges that he had planned for a long time to force her and Ms Jin to leave their jobs; alleges that he threatened her by saying that if she wanted to stay, she must behave and work properly; and says she was shocked and questioned what he would do next to treat her badly.

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4 *Chief Executive of the Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132.
5 At [38].
6 *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36].
7 *Zivaljevic*, above n 4, at [36].

[26] After the "Notice of Dismissal" was sent on 11 December 2019, Ms Yu replied expressing incredulity at the way she had been "fired". She said she could not understand the English-language document and that she would need time to seek help.

[27] The 12 December 2019 email follows on from those messages and it:

(a) uses the subject line "personal grievance";

(b) references their alleged dismissal and the date it is said to have occurred;

(c) states it is raising their personal grievance and asks for further information;

(d) in respect of Ms Yu, requests the company's health and safety rules, the warning she had been given, the New Zealand law and company regulations she was said not to have followed, and clarification of what error she had made;

(e) advises that Mr Han had made "big mistakes" and offers to send him precedent cases; and

(f) references the Notice of Termination and requests a confidential meeting regarding the disputed facts it contained.

[28] The requests for further information appear to correspond directly to the issues raised in the "Notice of Dismissal" sent by Mr Han on 11 December 2019.

[29] In context, it would have been abundantly clear that a personal grievance was being raised in relation to the dismissal. The requests for further information also make it obvious that the substantive basis for the dismissal (for example breach of the company polices) was being challenged.

[30] The test is an objective one, but it is not ignorant to context – it is not a question of whether a person ignorant of all the circumstances would read the email to be raising a personal grievance for unjustified dismissal, although I consider that such a person would read it in that way. In the totality of the circumstances, upon receiving the letter

from Mr Young a reasonable person in the position of the employer would have been aware that Ms Yu was disputing the reasons provided in the "Notice of Dismissal" and raising a personal grievance for unjustified dismissal.

[31] The Authority did not err in finding that the email of 12 December 2019 satisfactorily raised a personal grievance for unjustified dismissal.

Did the email statement of problem filed on 13 December 2019 validly raise a personal grievance?

[32] If I am wrong in my above conclusion, I also consider that the Authority did not err in finding in the alternative that the statement of problem filed on 13 December 2019 validly raised a grievance.

[33] A personal grievance may be raised via a statement of problem filed in the Authority, providing the other statutory requirements are met.

[34] Ms Yu's statement of problem was not provided to the Court despite the parties being advised that documentation filed in the Authority should be provided separately to the Court if they wished to rely on it.

[35] The determination says that the statement of problem stated: "I was unjustifiably dismissed with substance and procedural flaws".[8] In the context of the events earlier that week, there would not have been any confusion as to what the grievance was. Mr Han's subsequent statement in reply, which is before the Court, reinforces that this was the case.

[36] A previous judgment of this Court found that an unjustified dismissal grievance had been validly raised by a letter which stated the decision to dismiss was "unfair and was unjustifiable". It was held that while this was not ideal in terms of setting out the grounds relied on in order to facilitate the employer's response, the letter itself was not equivocal, made it clear that there was a grievance to be addressed, and invited the employer to respond.[9]

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8 *Urban Décor*, above n 1, at [55].

9 *Disabilities Resource Centre Trust v Maxwell* [2021] NZEmpC 14, [2021] ERNZ 47 at [22].

[37] The phrase quoted by the Authority falls into a similar category. While it could have provided more detail, it was not equivocal and on its own, or at least in combination with the WeChat messages and email of 12 December 2019, it made it clear that there was an unjustified dismissal grievance to which the employer needed to respond.

[38] Further, while Mr Han, in his statement in reply, addresses the many complaints apparently raised, most of the document is given over to explaining the events of 10 December 2019 and justifying his decision to, as he saw it, dismiss Ms Yu and Ms Jin from employment. It is apparent from that document that he understood the primary issue to be the dismissal, the events that led to it, and his justification for it.

[39] The Authority's finding in relation to the statement of problem was that it identified the problem and was within 90 days. I agree. The Authority did not err.

Did Mr Han's statement in reply and/or attendance at mediation amount to consent?

[40] I do not consider it necessary, having made the above findings, to deal with this question in detail.

[41] Statements in reply have previously been found to amount to an implied consent,[10] as has attendance at mediation.[11]

[42] In this case, both actions took place during the 90-day window for the raising of a grievance. The reality of this situation is that the engagement between Mr Han and Ms Yu and her representative is consistent with the grievance being raised in time with sufficient information to enable the employer to respond and to attend mediation.

[43] In any event, I am not drawn to an argument where an employer would be able to undertake extensive engagement in an employment relationship problem and then,

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10 See for example *Ale v Kids at Home Ltd* [2015] NZEmpC 209, [2015] ERNZ 1021.

11 See for example *Board of Trustees of Te Kura Kaupapa Motuhake o Tawhiuau v Edmonds* [2008] ERNZ 139.

after the 90-day window expires, fall back on a claim that the original attempts to communicate the grievance had been insufficient.

[44] As a result of the above conclusions, a personal grievance for unjustified dismissal was validly raised by Ms Yu within 90 days. The Authority did not err.

[45] I do not propose to address the two further questions raised in the statement of claim around particulars. The arguments fall short for the same reasons that the email of 12 December 2019, or alternatively the statement of problem, was held to be sufficient.

Were the defendants unjustifiably dismissed?

[46] On 10 December 2019 Mr Han was walking past Ms Jin's work station and saw her pick up her phone. The time was around 10 am which was the usual time for a morning tea break. Mr Han claimed that he saw her "playing" on WeChat, a Chinese social media service. Ms Jin said she accidentally opened the app while checking the time. The Authority did not consider it necessary to decide which recollection was correct.

[47] Urban Décor asserted that there was a policy in place dealing with phone use. Ms Yu and Ms Jin were both reluctant to accept that this was the case. However, the Authority considered it more likely than not that there was a phone use policy in place and that the defendants were aware of it.

[48] An argument followed. which overtook the initial issue of the phone use, originally between Ms Jin and Mr Han. Ms Yu was nearby and initially did not involve herself before eventually engaging to defend Ms Jin. The Authority found that the argument was about Ms Yu and Ms Jin challenging Mr Han and the company's policies.[12]

[49] The argument was lengthy and captured on the factory's picture-only CCTV footage. It took place in two phases. The first phase took ten minutes before the

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12 *Urban Décor* , above n 1, at [66].

morning tea break. The argument continued after that break for a further five minutes before Ms Jin picked up her bag and left the factory. She returned shortly afterwards before leaving again. Ms Yu then left a short time later after further argument with Mr Han, which he appears to have initiated. Neither defendant punched their timecards as they left.

[50] Mr Han, Ms Jin, Ms Yu and other witnesses all had differing recollections of what was said during the argument. There were issues with the credibility of the other witnesses given the similarities between their statements and the involvement of Mr Han in typing them up and translating them. However, the Authority noted that the defendants had accepted a number of aspects of the dialogue as being reflective of what was said.

[51] The dialogue script produced by Mr Han and the other witnesses referred to both employees saying they quit. Ms Jin said she could not remember saying she quit, and Ms Yu said it was possible that she had said it but could not remember. The Authority expressed its surprise that they could not remember such an important detail and took this into account along with their reluctance to answer questions generally.[13]

[52] Importantly, for the Court's purposes, it concluded that both had said they quit.

[53] Ms Jin messaged Mr Han on WeChat later that afternoon, asking him to keep the CCTV footage. The Authority recorded Ms Jin as saying:[14]

> Don't think that because you say the factory is yours that you can do whatever you like or you can get away with the basic [or the most basic] respect a boss must give to his employees according to New Zealand law.
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> Because of your unreasonable action again and again you shouted and scolded, I couldn't carry on working as per usual.

[54] Ms Yu also messaged Mr Han and expressed hurt at his harsh words and said she could still not calm down.

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13 At [41].
14 At [42].

[55] Mr Han responded at 4.34 am the next morning by sending letters, entitled as notices of dismissal, attached to a message. The letters were similar but not identical. Ms Jin's letter referred to her objecting to the company phone policy, becoming aggressive and verbally abusive, and then walking offsite. Ms Yu's letter referred to her previous warning. Both letters referred to their unwillingness to comply with policies and to accept their employer's correction. The letters stated that their "employment is terminated effective immediately" with final pay to be paid out the following week.

Were Ms Yu and Ms Jin "dismissed" or did they resign?

[56] As noted above, the Authority found that the defendants said they quit before leaving the factory. It then went on to analyse those words, and Mr Han's subsequent actions, through the lens of the cases in relation to "cooling off" periods – in particular, *Boobyer v Good Health Wanganui Ltd*.[15]

[57] *Boobyer* did not actually deal with a "cooling off" scenario but addressed "unsafe" resignations more broadly. It is helpful to review its discussion on this issue.[16]

> … Cases in which an employee is, against his or her will, treated by an employer as having resigned are by no means rare. They fall into several quite distinct types or categories. First there are the cases where the employee gives an unambiguous resignation and later seeks to resile from it. In such a case, of which *NZ Labourers IUOW v Hodder & Tolley Ltd* [1989] 1 NZILR 430 is an instance, the resignation cannot be withdrawn without the employer's consent, at any rate where there has been no breach of duty by the employer giving rise to a reactive resignation amounting to a constructive dismissal. This is because the contract provides a mechanism for its termination by the employee and once that has been invoked by the employee giving the prescribed period of notice the contract comes to an end automatically when the notice given expires unless both parties agree to revive or renew it. Then there is the case, exemplified by *Sadd v Iwi Transition Agency* [1991] 1 ERNZ 438, where the communication is equivocal, the employee learns that the employer has misunderstood it as a resignation contrary to the employee's intention but does nothing within a reasonable time to correct the employer's false impression. In such a case the employee must suffer the adverse consequences of passively standing by and letting the employer think that a resignation has taken place. Another type is illustrated by *NZ PSA v Land Corporation Ltd* [1991] 1 ERNZ 741. That is where an employer seizes upon words neither intended to amount to a resignation nor reasonably capable of doing so, or takes advantage of

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15 *Boobyer v Good Health Wanganui Ltd* EmpC Wellington WEC3/94, 24 February 1994.
16 At 2.

> words of resignation known to be unwitting or unintended and the employee promptly makes it plain that the employee's communication was not meant to be a resignation and should not be treated as if it were. In that kind of case, the employer cannot safely insist on its interpretation of what the employee said or wrote. This is also the position where words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally and either it is obvious that this is so or it would have become obvious upon inquiry made soberly once *"the heat of the moment"* had passed and taken with it any *"influence of anger or other passion commonly having the effect of impairing reasoning faculties"*: *Chicken and Food Distributors (1990) Ltd v Central Clerical Workers Union* [1991] 1 ERNZ 502, 507. Examples of a sudden flare up being treated as a resignation are scattered through the books. Some feature rather extreme actions by the employee including emphatic language and expressive conduct extending to actually walking out or using words of resignation, only to return or recant later. Each case turns on its own facts but it is at least clear that *"[a]n apparent resignation can also amount, notwithstanding the words used, to a dismissal. For example, if the employer's actions or words oblige or strongly tend to induce an employee to proffer a resignation, the result can still be a dismissal in reality"*: *Wellington Clerical Workers Union v Barraud and Abraham Ltd* (1970) 13 MCD 93, 95 per Horn SM. The case is also reported at [1970] BA 347. Then there are the cases of abandonment of employment deemed under some employment contracts to arise from unauthorised or unnotified absences from work of defined duration.

[58] This case has led to a number of cases where an employee has established an unjustified dismissal claim by proving that their resignation was unsafe because it was given in the heat of the moment and should not have been relied upon by the employer.

[59] The Court's recent decision in *Vermuelen* reconsidered the issue of cooling off periods and discusses the principles that sit behind the concept. This analysis led the Court to take a different approach.[17]

[60] In that case, Mr Vermuelen was summoned to a meeting by his employer. Present at the meeting were a number of members of senior management. He was unaware of the subject of the meeting but the Court accepted that its purpose was only to provide sales advice and encouragement to Mr Vermuelen in order to address his poor sales performance. There was no intention to call into question his ongoing employment or to place him on any sort of formal performance management scheme. Mr Vermuelen became upset and expressed his opinion that he was unable to perform the role. He then submitted his resignation.

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17 *Vermuelen*, above n 3.

[61] At the same meeting, after the resignation, the employer offered him employment with a related company in a different role. This was after Mr Vermuelen belatedly expressed concerns about the consequences of his resignation for his family and his immigration status. The judgment does not suggest he attempted to resile from his resignation at the time.

[62] The cooling off cases were raised and the Chief Judge considered whether Mr Vermuelen should have been allowed to "cool off" before the employer acted on the resignation he gave whilst emotional.

[63] After reviewing cooling off cases such as *Boobyer*,[18] *Chicken and Food Distributors (1990) Ltd v Central Clerical Workers Union*,[19] and *Kostic v Dodd*,[20] the Court made four observations that led her to approach the issue of a possibly unsafe resignation differently:[21]

(a) First, it was noted that a resignation is a unilateral act. Once it has been notified (in whatever form) it is not open to the employer to claim that the employment relationship remains on foot and the resignation is of no effect.[22]

(b) Second, the Court noted that an employee (unlike an employer) was not required to justify their decision to resign. Nor was it required to be demonstrably well thought through.

(c) Taking those factors into account, the Court considered that the key issue was whether, on an objective assessment, the employee resigned.[23] It then held that if it was a resignation, there was no legal obligation to hold off on recognising that resignation, and failure to do so could not turn it into a dismissal.

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18 *Boobyer*, above n 15.
19 *Chicken and Food Distributors (1990) Ltd v Central Clerical Workers Union* [1991] 1 ERNZ 502 (LC).
20 *Kostic v Dodd* EmpC Christchurch CC14/07, 11 July 2007.
21 *Vermuelen*, above n 3, at [39]
22 It was noted that an employer may have a claim if the notice period in the employment agreement has been breached.
23 It did so by comparison to the law that had developed around dismissals.

(d) Any concerns about whether a resignation arose from an employer's misconduct or breach could then be addressed via the developed case law relating to constructive dismissals.[24]

[64] On that analysis, whether or not an employee has resigned is an objective test as to whether a reasonable employer, with knowledge of the surrounding circumstances, would have reasonably considered the employee to have resigned. Clear words of resignation are likely to clear that bar unless a different understanding can be informed by the surrounding circumstances.

[65] As already noted, resignation is a unilateral act. Having been presented with a resignation, there is no ability for an employer to reject that resignation and declare the relationship ongoing. Equally, which is potentially relevant here, there is no ability to dismiss the employee (even if the employer purports to do so) as the relationship has already ended.

[66] Prior to *Vermuelen* and the opportunity to provide further submissions, Mr Zhang had already argued an approach which was largely consistent with that of the Chief Judge in that case. From the outset his submission was that Ms Yu and Ms Jin had resigned as opposed to being dismissed.

[67] Ms Moncur puts forward two arguments. First, she submits that the employees did not resign but were dismissed. Second, if she is wrong about that, she says it was a constructive dismissal.

[68] Ms Moncur argues that subsequent events should inform the Court's understanding of whether a resignation occurred. She points out that Mr Han did not consider the defendants had resigned at the time, otherwise he would not have taken steps to dismiss them. Effectively, she relies on Mr Han's subjective understanding at the time. However, the position as set out in *Vermuelen* is that the test is an objective one.

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[24] *Vermeulen*, above n 3, at [33]–[42].

[69] This does not necessarily mean that any use of the word "quit" is to be read as a resignation. The analysis is a contextual one. In many situations, the hypothetical scenarios in *Boobyer* may still apply. For example, resignations given in a humorous or sarcastic fashion may not satisfy the objective test; nor will storming out of the room and being absent from work for a period of time but returning a short time later.

[70] In this case, Ms Yu and Ms Jin were both found by the Authority to have stated that they quit. They then took their bags, left the workplace abruptly and did not return throughout that entire day. They did not clock out when they left, and no contact was made until after work hours. Further, the contact made later did not indicate an intention to return to work at all. On an objective basis, the facts support a finding that Ms Yu and Ms Jin resigned. Mr Han's dismissal letters do not and cannot turn those resignations into dismissals; nor do his subsequent statements where he admits having dismissed them.

[71] That, however, is not the end of the inquiry. As indicated by Chief Judge Inglis in *Vermuelen*, a resignation induced by an employer's misconduct or breach may amount to a constructive dismissal.

Were Ms Jin and/or Ms Yu constructively dismissed?

[72] Ms Moncur made the alternative submission that if the defendants were not found to have been dismissed, they should instead be found to have been constructively dismissed. That submission appears to be in reliance on *Vermuelen*,[25] and on the Court's ability under s 122 of the Act to find that a personal grievance is of a type other than that alleged. In this case, the argument is that it is open to the Court to find that there was not an unjustified dismissal, but that there was an unjustified constructive dismissal.

[73] Ms Moncur submits that all of the elements of a constructive dismissal are present, saying that the evidence establishes that any resignation is the result of the plaintiff's breach of duty. She characterises this breach as a "breach of good faith"

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[25] *Vermuelen*, above n 3, at [42].

and appears to suggest that the basis for the breach was the alleged ongoing bullying and humiliation Ms Yu and Ms Jin were subjected to by Mr Han.

[74] Three paragraphs of the Authority's determination are referred to in support of the claim that the defendants were subjected to ongoing bullying.[26] Those paragraphs refer to Mr Han telling the defendants "you have feet and legs and can leave of your own accord", and the WeChat messages sent after the 10 December 2019 incident in which reference is made to "harsh words" or being "scolded".

[75] The issue for the defendants is that while that evidence was recorded by the Authority, it was not scrutinised or relied on.

[76] In respect of the "leave of your own accord" comment, the Authority was simply recording a claim made by Ms Jin (immediately after noting she was an uncooperative witness). There was no finding as to whether the alleged statement had been made.

[77] In terms of the WeChat messages, while it may be that Mr Han was critical of them during the 10 December 2019 argument, there was no finding made by the Authority about what was said or how it was said that could elevate it to instances of bullying behaviour or other misconduct that would amount to repudiatory conduct.

[78] In fact, it is unclear exactly how much evidence the Authority heard about Mr Han's behaviour during the argument. Because the Authority Member viewed the subsequent conduct as more important (operating under the cooling off law), it appears they did not consider it necessary to explore in depth the incident itself and what was said at the time by Mr Han.

[79] Accordingly, the Authority made very few findings about what was said by Mr Han during the argument. It did, however, find that he told Ms Yu and Ms Jin that he did not want to dismiss them.[27] Importantly, in relation to the incident itself, it also

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26 *Urban Décor*, above n 1, at [33], [42] and [43].
27 At [67].

found that the situation had not yet become one where there had been sufficient action to destroy the trust in the employment relationship.[28]

[80] In relation to alleged events leading up to the incident, it put to one side, at an early stage, the complaints about ongoing mistreatment and harassment being perpetuated by Mr Han, as being irrelevant. This means that the allegations made by Ms Moncur now in support of an argument for constructive dismissal, that Mr Han was, on earlier occasions, "harsh" or verbally abusive, were not considered.

[81] To establish a constructive dismissal, the defendants must show that Mr Han:[29]

(a) had given the employees an option of resigning or being dismissed;

(b) had followed a course of conduct with the deliberate and dominant purpose of coercing the employees to resign; or

(c) had breached a duty or duties which led the employees to resign.

[82] Ms Moncur seems to be arguing that this is a case of situation (b) or (c).

[83] It is unclear what exactly the purported breaches are. Ms Moncur identifies the bullying complaints (which have not been tested) and a breach of good faith (but provides no clarity as to what this was). Reference is made to Ms Yu and Ms Jin being repeatedly shouted at and publicly humiliated, but it is unclear if this is referring specifically to the 10 December 2019 incident, or cumulatively to numerous instances of alleged bad behaviour by Mr Han. In any case, there is very limited evidence before the Court of such behaviour or any findings of the Authority to that effect.

[84] Urban Décor filed its non-de novo challenge on narrow points. It was seeking to argue that, having found the defendants had quit, the Authority erred in going on to consider "cooling off" obligations and find they had been dismissed. It made a

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28 At [67].

29 *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA), (1985) ERNZ Sel Cas 136 at 139.

strategic choice in doing so to preserve favourable factual findings. The defendants did not cross-challenge and essentially sought to defend their success in the Authority.

[85] The task for the Court in these circumstances is not to decide the issue afresh, reaching its own conclusion on the matter, but to decide whether the Authority made an error of fact and/or law in determining that Ms Yu's grievance was raised within 90 days; that the company consented to the grievance being pursued out of time; that the employees had been unjustifiably dismissed and were due remedies that should only be reduced by 50 per cent; and, if so, whether part(s) of the determination ought to be set aside.[30]

[86] Whether or not utilising s 122 is open to the Court will depend on the extent of the non-de novo challenge, and the nature and extent of the hearing as directed by the Court.[31]

[87] Here, the utilisation of s 122 in the manner proposed by Ms Moncur would overstep the issues that had been delineated for the Court and require an inquiry into the facts that the case before the Court cannot sustain.

[88] The evidence before the Court does not support a finding of constructive dismissal.

[89] Accordingly, I find that the Authority erred in finding that the employees were unjustifiably dismissed.

Remedies

[90] Given the above findings, it follows that the Authority also erred in finding that Ms Yu and Ms Jin were entitled to be reimbursed for lost wages under s 123(1)(b) and compensation under s 123(1)(c)(i) of the Act.

[91] The issue of whether remedies should be reduced is no longer relevant.

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30 *Xtreme Dining Ltd t/a Think Steel v Dewar* [2016] NZEmpC 136 at [13]–[17]; *UBE v TBN* [2022] NZEmpC 46.

31 Section 183(3).

Conclusion

[92] The challenge on the first issue of whether Ms Yu raised her personal grievance within 90 days is dismissed.

[93] The challenge on the second issue of whether Ms Yu and Ms Jin were dismissed succeeds. The Authority's finding of unjustified dismissal is set aside. It follows that the ensuing monetary award is also set aside.

[94] I reserve costs. The parties should attempt to resolve this issue. If they are unable to do so, any application should be filed within 15 working days of the date of this judgment. Any response is to be filed within 15 working days thereafter.

Kathryn Beck
Judge

Judgment signed at 4.15 pm on 29 March 2022